No. 10,355

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIBERTY MUTUAL INSURANCE COMPANY (a Massachusetts corporation),
Appellant,

vs.

JOHN C. GRAY, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, and LELAND T. McCLEES,
Appellees.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

GENERAL COMMENT ON APPELLEES' BRIEF.

Taking up the sections of Appellees' Brief in their serial order it may be said, first of all, that appellees' Statement as to Jurisdiction (pages 1-7) requires no comment. The same is true of their Summary of Pleadings. (Pages 7-12.)

Without naming any specific inaccuracies or omissions therein, appellees "controvert the statement of the case set forth by appellant", and submit one of

their own. On page 14 of their brief appear these words:

> "* * * the claimant, in pursuance of the practice employed by his employers of transporting their employees from Honolulu to the Kaneohe Base, presented himself on the morning of April 17, 1942, attired in his working clothes at the designated place where the truck transportation supplied by his employers picked up the workmen for transportation from Honolulu to the Kaneohe Base. The claimant, after exchanging salutations with the driver of the truck, took a seat in the truck along with other workmen designated for the Kaneohe Base."

These words imply that the morning truck running between Honolulu and Kaneohe was for the benefit of any Contractor employees who might choose to use it, whereas its sole purpose was to take *Honolulu* residents to their work at the Naval Base. Claimant McClees did in fact testify that he climbed on the truck along with other workers and took a seat among them, but even he did not claim this service as a right, much less as a condition of his contract of employment. The claimant was asked by Deputy Commissioner Schmitz (R. p. 72):

> "Q. Is there a rule by the Contractors that would require the men to obtain their own transportation by taxicab or bus from Honolulu to the job when they actually live out at Kaneohe and are visiting in Honolulu?
>
> A. You have got to furnish your own transportation then; it is up to you, yes."

The claimant had previously admitted that he came into town on a personal mission. (R. p. 72.)

Until some error is definitely pointed out appellant will stand by its Statement of the Case as printed in its opening brief, pages 9-12, for it follows the transcript of the record.

ANALYSIS OF APPELLEES' AUTHORITIES.

Appellant's counsel have examined each one of the cases submitted by appellees as supporting the award, and have read the entire opinion in those in which the Going and Coming Rule is involved. One of appellees' authorities is a frozen nose case. Two represent the railroad track-hazard class mentioned on page 16 of Appellant's Opening Brief, where a claimant's injuries were incurred through being struck by a passing train or switch engine. Nothing in these cases relates to the Going and Coming Rule as here considered.

It will be observed that in the traveling employee cases cited by appellees, in each instance recovery by a claimant is predicated upon the knowledge and consent of the employer as to the means used in going or coming. In some cases, the employer arranged for transportation as part of the wage, in others he consented to the use of trucks, logging trains or the like by the employees until long usage had established a custom. But in no case cited by appellees does it appear that an employee absent on leave (or

overdue on leave) recovered compensation where he was returning to his job in a truck not owned by the employer, not driven by one of the claimant's fellow employees and not designated by the employer as the conveyance which claimant must use.

Following is an analysis of each authority cited by appellees' brief, to which the page numbers in the black type refer:

Voehl v. Indemnity Ins. Co., 288 U. S. 162, 77 L. Ed. 676. (Page 18.)

For an analysis of this case see Appellant's Opening Brief, page 15. The opinion contains an excellent statement of the "Going and Coming Rule" and the exceptions thereto, but nothing in the opinion or in the facts of the case tends to uphold the judgment in the instant case. Voehl was injured while actually under the direction of his employer and on active duty for which he was being paid.

Swanson v. Latham, 90 Conn. 87, 101 Atl. 492. (Page 19.)

Not in point herein for the reason that Swanson, the employee, who was killed, was riding with a fellow workman whom the employer had engaged to transport such men as chose to live in Willimantic, Connecticut, to and from Stafford Springs, Connecticut, where Latham & Crane, Willimantic contractors, were erecting a building. Employees who wished to remain in Stafford Springs from day to day, were allowed 90 cents a day in lieu of transportation to and from Willimantic. The award in claimant's favor was affirmed.

Larke v. Hancock Mutual Life Ins. Co., 90 Conn. 303, 97 Atl. 320. (Page 19.)

Appellees do not state why they cite this case. It would appear to be out of place in sunny Honolulu, for Larke's injuries arose from a frozen nose. The fourth head note (97 Atl. 320) states the facts of the case as follows:

> "An employee of an insurance company who was required to solicit insurance and collect premiums was required in his business to make long rides, regardless of weather conditions. On a very cold day his nose became frostbitten. The frost bite produced a lesion of the skin and tissues, through which the servant contracted erysipelas, from which he died."

Cudahy Packing Co. v. Industrial Insurance Commission of Utah, 60 Utah 161, 207 Pac. 148.

This is a case involving special hazards to which an employee must expose himself while approaching or leaving his employer's premises. (See Appellant's Opening Brief, p. 16, third paragraph.) The location of the Cudahy packing plant near railroad tracks made it necessary for employees going to work to cross the tracks on a public road at a point about 100 feet from the entrance to the plant. An employee attempting to cross the tracks was struck by a railroad locomotive and killed. It was held that death arose out of the employment.

As appellant has pointed out on page 16 of its opening brief, these railroad hazard cases are in a class by themselves, but it is a class to which the case at bar does not belong.

Lumber Reciprocal Association v. Behnken, 112 Texas 103, 246 S. W. 72. (Page 19.) The second head note (246 S. W. 72) explains the nature of this case, likewise its inapplicability herein.

"Where a lumber company owned a whole town wherein the residences of its employees were separated from the boarding house, store, and main works by a railroad track over which there was but one well defined dirt road crossing, which was necessarily used by all employees in going to and coming from work, *held,* that an injury to an employee at such crossing while returning to his work after his noonday meal, by a train not under the control of the company, occurred in the course of his employment, and had to do with and arose out of the business of the employer within the Workmen's Compensation Act."

Lamm v. Silver Falls Timber Co., 133 Ore. 468, 286 Pac. 527. (Page 19, also pages 30-35.)

This case represents a common type of exception to the Going and Coming Rule. The claimant, a logger, was injured while returning from town to the logging camp on his employer's logging train. *It was the custom of the camp and one of the privileges accorded employees as a condition of their employment* that they might ride back and forth on the train at pleasure. The isolation of the camp and distance from town rendered this arrangement necessary as there was no public or independent passenger service from town to the Silver Falls Timber Company's camp as there was from Honolulu to Kaneohe.

Use of logging trains by employees is customary, and in the *Lamm* case long usage had established it

as something not only permitted and acquiesced in by the employer but actually expected by it.

Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554.

The claimant in this case was a bricklayer apparently living in New York City. He was employed by the Fuller Company, contractors who were constructing a residence at Great Neck, Long Island, two miles from the railroad station. The employer hired an automobile to take his workmen, who arrived by train, from the station to the job each day and bring them back at night. While making one of these trips Littler was thrown out and injured. The situation is similar to the one which would have arisen had claimant McClees been injured while being transported from Bird Farm Camp to Kaneohe. Under the actual circumstances of the instant case the *Littler* case is not in point.

Smith v. Ind. Acc. Com., 18 Cal. (2d) 843, 118 Pac. (2d) 6. (Page 20.)

This is one of the cases on which appellees most depend. As will presently be shown, they have failed to print portions of the opinion unfavorable to their contention. But even the summary of the case set forth on page 20 of their brief offers no authority for affirming the judgment herein. Appellees say (p. 20, second paragraph) "the employee was working on Treasure Island". Claimant Smith was in fact an employee of the exposition company, was injured *on his employer's premises* when he jumped from his employer's truck upon which he was riding after he had checked out at

the Administration building at the close of the day's work.

Even with this set up, the California Industrial Accident Commission denied compensation to the claimant. The California Supreme Court annulled the Commission's order denying compensation, giving as its reasons for so doing (1) the fact that employees were freely permitted by the exposition company to ride about the grounds on the exposition trucks, and (2) more particularly because the injury happened on the employer's premises. Neither of these circumstances are present in the instant case, which fact makes the *Smith* case unavailable to claimant as a precedent.

That portion of the opinion not printed or summarized by appellees furnishes ample authority for reversing the judgment herein:

> "It may be observed with reference to petitioner riding upon the employer's truck, that it is the general rule that when transportation is furnished by the employer to convey a workman to and from his place of work, *as an incident of the employment,* and the means of transportation *are under the control of the employer,* an injury sustained during such transportation arises in the course of employment and is compensable. (Harlan v. Industrial Acc. Com., 194 Cal. 352, 228 Pac. 654; Dellepiani v. Industrial Acc. Com., 211 Cal. 430, 295 Pac. 826.) *But the transportation furnished must be connected with the employment,* or, as said in Trussless Roof Co. v. Industrial Acc. Com., 119 Cal. App. 91, 93, 6 Pac. (2d) 254:

'The use of the words "as such" is necessary *because courtesy rides given by the employer do not give rise to liability under the statutes.* (Boggess v. Industrial Acc. Com. (1917), 176 Cal. 534, L. R. A. 1918F 883, 169 Pac. 75; Gruber v. Mercy (1929), 7 N. J. Misc. Rep. 241, 145 Atl. 106.) In other words, *the transportation has to be furnished as a part of the contract of employment,* to come within the rule. (In re Donovan (1914), 217 Mass. 76 (Ann. Cas. 1915C 778, 104 N. E. 431.)' "

Smith v. Industrial Acc. Com., 18 Cal. (2d) 843, 118 Pac. (2d) 6, supra.

It will thus be seen that the *Smith* case, when fairly read and considered as a whole, supports the contentions of appellant herein rather than those of appellees.

Southern States Mfg. Co. v. Wright, 146 Fla. 29, 200 So. 375. (Page 21.)

In connection with the consideration of this case it should be remembered that claimant McClees at the time of the accident was living at Bird Farm Camp. He was required to live there. (R. p. 59.) Bird Farm Camp was about a mile from the job and the Contractors furnished transportation thereto. (R. p. 60.) Had claimant McClees been injured while riding between Bird Farm Camp and the Kaneohe Base, *Southern States Mfg. Co. v. Wright* would be a perfect precedent. Under the circumstances of the instant case, however, its value to appellees is negative.

Wright was injured while being transported in a truck of his employer to the place of employment. This transportation was by means of employer's truck and was arranged for by employer.

Fritzmeier v. Texas Employers' Ins. Ass'n, 131 Tex. 165, 114 S. W. (2d) 236. (Page 21.)

In the above case the employees of a tank builder at Gladewater, Texas, were instructed to meet at a designated place in Gladewater each morning to ride to a job several miles out of town. The conveyance was a truck used on the job. Fritzmeier was injured while en route to the job. Here also it may be said that the case would be in point if claimant McClees had been injured while being transported from Bird Farm Camp to Kaneohe Base.

As appellees remark (p. 22), the award was affirmed because the employer knew of the arrangement and recognized the necessity of it, neither of which reasons apply to the instant case.

In *Lee v. Fish et al.,* 16 N. J. M. 63, 196 Atl. 662 (page 22 of Appellees' Brief), and *George Taylor v. M. A. Gammino Const. Co.,* 127 Conn. 528, 18 Atl. (2d) 400 (p. 23), the transportation was accomplished with the knowledge and acquiescence of the employer and was authorized by him. The route traveled in each instance was between the employee's home and the job. The same is true of *Rubeo v. Arthur McMullen Co.,* 118 N. J. L. 530, 193 Atl. 797, cited on page 25 of Appellees' Brief.

Chrysler v. Blue Arrow Transport Lines, 295 Mich. 606, 295 N. W. 331.

In this case the claimant drove a truck between Grand Rapids, Michigan, and Chicago. Arriving at Chicago on Saturday too late to load for the return that day, he boarded another company truck and returned to Grand Rapids in order to spend the week end at home. He was injured on Sunday while returning to Chicago on a third truck. Inapplicability of this case to the one at bar is distinctly shown by the last line of the citation on page 25 of Appellees' Brief:

> "In the case before us *there was a clear undertaking on the part of the employer to furnish week-end transportation* between Grand Rapids and Chicago whenever the last trip of the week did not leave the driver in his home town."

William Venho v. Ostrander, etc., 185 Wash. 138, 52 Pac. (2d) 1267; *Johnson v. Thompson Sterrett Co.,* 174 Ga. 656, 157 S. E. 363, and *Alberta Contracting Corp. v. Santomassimo,* 150 Atl. 830 (New Jersey) (Appellees' Brief, pp. 26-28), are all cases where the transportation was furnished the employee either by the express direction of the employer or with his knowledge, acquiescence and consent. The character of transportation furnished would be the counterpart of that extended to claimant McClees each morning when his employers transported him from his boarding place at Bird Farm Camp to Kaneohe Base, therefore these cases are not in point herein.

CONCLUSION.

The authorities cited in appellant's opening brief cover the law of the Going and Coming Rule to such an extent that additions might be regarded as merely cumulative. However, a single case involving "courtesy" or "accommodation" rides may aptly be inserted here:

In this case, the employees were left to find their own way of reaching their places of work along a newly constructed highway and it was customary for them to ride to their places of work along the highway in their own autos or in those of friends or in the employer's trucks or hired trucks. A foreman, about one-half hour before the usual time for beginning work, offered a ride to an employee whom he saw walking along the road in order that the employee might begin work as soon as possible. The employee fell from his position on the running board of the foreman's vehicle. It will be noted that in this case there was every reason for saying that the transportation of the deceased employee was for the benefit of the employer as well as the employee. However, the Court denied compensation, saying:

> "In the instant case it was optional with Hickman by what method he would go to the place where his work and employment would commence, as to whether he would walk or ride thereto. His employer did not include the privilege of transportation from his home to his work within the terms of his employment, expressly or impliedly. The undisputed facts clearly show that the employer never intended to include transportation

to his work as an incident of his employment or the hazard involved in such mode of transportation for use of the highway as one of the risks of his employment or incidental thereto."

Biliter v. Hickman (Ky.), 56 S. W. (2d) 1003.

For the reasons herein set forth it is again respectfully submitted that the judgment of the District Court should be reversed and the compensation order and award of compensation in favor of appellee Leland T. McClees annulled.

Dated, San Francisco,
May 24, 1943.

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